(19,932.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 430.

CONRAD WECKER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL ENAMELING AND STAMPING COMPANY AND GEORGE WETTENGEL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT OF THE CASE.

This is an action for personal injuries originally brought by the plaintiff in error against defendants in error in the Circuit Court for the City of St. Louis, State of Missouri. The cause was removed to the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri upon a petition of The National Enameling Company, one of the defendants in error, which petition alleges as grounds for removal that there is in said suit a controversy between citizens of different states and that it can be wholly determined between them, and also that there is a separable controversy stated upon the face of the petition which is wholly between the plaintiff and the removal petitioner. The removal petition is hereinafter set forth at length. Before the cause came on for trial the plaintiff in error moved to remand it to the State Court. The motion to remand is hereinafter set forth. This motion to re-

mand was overruled by the court. Thereafter the cause came on for trial. Plaintiff in error elected to stand upon his motion to remand and refused to recognize the jurisdiction of the court. Thereupon final judgment was rendered against the plaintiff in error from which he prosecutes this writ of error to this court.

The only question to be decided upon this writ of error is whether or not the court erred in deciding that plaintiff's cause of action, if any, is solely against The National Enameling and Stamping Company, the non-resident defendant, and in overruling for this reason the plaintiff's motion to remand.

PLAINTIFF'S PETITION.

Omitting the caption, plaintiff's petition is as follows: (Trans. pp. 3-5.)

> Plaintiff for his cause of action, states: That the said National Enameling and Stamping Company is a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, and that said Harry Schenk and George Wettengel are residents of the City of St. Louis, State of Missouri. That at and before the time of the commission of the said grievances hereinafter mentioned, said plaintiff was employed by said defendant to fire, fill, stir, empty and attend to certain large metal pots used by said defendant corporation for melting grease and lubricant matter at the plant operated by it at Granite City, County of Madison, State of Illinois. The said grease and lubricant matter was delivered by said defendant corporation to said plaintiff in solid form in barrels of great weight, to wit: about six hundred (600) pounds each. In the course of his said employment it was plaintiff's duty, after removing the barrels from around said grease and lubricant matter, to hoist the same to the top surface of the furnace structure, into which said pots were set, and to dump said grease and lubricant matter into the said pots. The said defendant corporation wholly and negligently failed to perform the duties, which as master it owed to said plaintiff, while engaged in its employment as aforesaid. Defendant's said negligence consisted in this, to wit: that it negligently allowed said pots, about which plaintiff was employed as aforesaid, and which were constantly filled with hot and boiling grease and lubricant matter, to remain open and exposed and negligently failed to provide for the said pots any covering, railing, or any device or means of any character whatsoever whereby to reasonably protect plaintiff, its servant, from accidentally falling or slipping into the same while engaged in the performance of his aforesaid duties. And said defendant corporation negli-

gently constructed said furnace structure in which said pots were set, on and about which said plaintiff was employed by said defendant corporation; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for said plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and said defendant corporation negligently gave to plaintiff such instructions as to the manner of performing his said duties as unreasonably endangered the safety of said plaintiff in carrying out the same.

As a result of the said premises and of said defendant corporation's said negligence, plaintiff, while engaged in the performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid open, unguarded and unprotected pots containing hot and boiling grease and lubricant matter; and received great and painful burns and injuries, the nature and extent of which are hereinafter more particularly described.

Plaintiff further says that the said Harry Schenk and the said George Wettengel were employed by said defendant corporation and charged by it with the superintendence and oversight of said plaintiff in the performance of his aforesaid duties and the said Schenk and the said Wettengel were employed by said defendant corporation and charged by it with the duty of superintending and properly planning the construction of the said furnace structure into which the said pots were set; and further charged by said defendant corporation with the duty of providing for said pots reasonably safe and suitable covering, railing, or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's aforesaid duties; and further charged by said defendant corporation with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and further charged by said defendant corporation with the duty of properly instructing said plaintiff as to the manner of performing said plaintiff's duties. Nevertheless said defendants, Harry Schenk and George Wettengel, negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties; and negligently failed to provide for said pots reasonably safe and suitable covers or railing or other device to protect plaintiff from slipping or falling into the same while plaintiff was engaged in the performance of plaintiff's afore-

said duties; and negligently failed to provide and properly place reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of said furnace structure; and negligently gave to plaintiff such instructions as to the manner of performing plaintiff's said duties as unreasonably endangered the safety of said plaintiff in carrying out the same. As a result of the said premises and of the said negligence of said defendants, said plaintiff while engaged in performance of his said duties upon the top surface of said furnace structure, on or about the 12th day of November, 1902, lost his balance and fell into one of the aforesaid unguarded and unprotected pots containing hot and boiling grease and lubricant matter and received great and painful injuries, the nature and extent of which are hereinafter more particularly described. The injuries which plaintiff received as aforesaid, on or about November 12, 1902, and which hereinbefore he has alleged were the result of the aforesaid negligence of said defendant corporation and of said defendants Harry Schenk and George Wettengel, were the result of the joint negligence of said defendants, and each act of negligence which plaintiff has hereinbefore charged against each of said defendants was the joint act of all of said defendants."

Then follows a statement of the character of plaintiff's injuries and prayer for judgment.

THE PETITION FOR REMOVAL.

Omitting the caption, the removal petition of The National Enameling and Stamping Company is as follows: (Trans. pp. 7-10.)

"To the Honorable, the Circuit Court of the City of St. Louis, State of Missouri:

Your petitioner, The National Enameling & Stamping Company, a corporation, limiting its appearance herein for the purpose of filing this petition, and not admitting the jurisdiction of this court, over it and appearing for no other purpose whatever, respectfully represents to the court that it is one of the defendants in the above entitled suit, and your petitioner shows unto the court:

That it is one of the defendants in the above entitled suit;

That the matter and amount in dispute in said suit exceeds, exclusive of interests and costs, the sum or value of two thousand dollars ($2,000.00);

That the said suit is of a civil nature at common law, of which the Circuit Court of the United States had original jurisdiction;

That said suit has been brought and is now pending in this court, and has not yet been tried, nor has the time within which this defendant, your petitioner, is required by the laws of the State of Missouri, or any rule of this honorable court to answer or plead to the complaint of the plaintiff elapsed;

That said plaintiff herein is now and was at the time of the bringing of this suit and ever since has been a citizen of the State of New Jersey, in which state it was then and ever since has been, and is now duly incorporated, and that it was not at the time of the commencement of this suit and never has been and is not now incorporated in the State of Missouri, nor a citizen thereof;

That Harry Schenk, one of the co-defendants in this suit, has not been served with process herein; that he was at the time of the commencement of this suit, ever since has been and is now a citizen of the State of Illinois, residing in Granite City, Illinois;

That the said co-defendant, George Wettengel, is now, was at the time of the commencement of this suit and ever since has been a citizen of the State of Missouri;

That there is in said suit a controversy wholly between citizens of different states, and which can be wholly determined between them, to-wit: Between your petitioner and the said plaintiff, and that said separate controversy is wholly between your said petitioner and said plaintiff, and the said co-defendants of your petitioner are not interested in the determination thereof or necessary parties thereto, and said separate controversy is this: That your petitioner at the time of the alleged accident to the said Conrad Wecker was the employer of the said Wecker, and the owner of the factory wherein he was working, as appears by the said petition on file, and the issue and controversy whether this defendant negligently allowed the pots about which the plaintiff was employed to remain open and exposed, and whether your petitioner negligently failed to provide for said pots any covering, railing or other means to reasonably protect the plaintiff from slipping or falling into the same while he was performing his duties, and whether your petitioner negligently constructed the said furnace structure upon which the said pots were set, and whether your petitioner negligently failed to provide proper and reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating the grease and lubricant matter to the top surface of the furnace structure, and whether your petitioner negligently gave the plaintiff such instructions as to the manner of performing his duties and unreasonably endangering the plaintiff in carrying out the same, which controversies and matters must be wholly determined between your petitioner and the said plaintiff, and

in which its said co-defendants, Schenk and Wettengel, can have no interest.

And your petitioner further shows unto your Honor that there is a separate controversy stated on the face of said petition which is wholly between the said plaintiff and your petitioner, and may be wholly determined between them without its co-defendants being parties thereto, and that said separate controversy is this: That the said co-defendants, as servants of your said petitioner, may not be joined in this suit against them for the matters and things alleged against them in the plaintiff's petition, and that as to the matters and things alleged against your petitioner in said petition, it appears from the face of the petition that these matters are matters wholly to be determined between the plaintiff and your petitioner, and which may not be determined between the plaintiff and its co-defendants

And your petitioner further avers that there is in said cause the further separable controversy, namely: Whether the said plaintiff assumes the risk of being injured while in his employment, and that this controversy is wholly between the said plaintiff and your petitioner, and its co-defendants have and can have no interest therein, and the same may be wholly determined between the plaintiff and your petitioner.

And your petitioner further avers that the said Henry Schenk and the said George Wettengel were not at the time of the accident to the said plaintiff, or prior thereto, charged with the superintendency and oversight of the plaintiff, or with the duty of superintending and properly planning the construction of the said furnace structure, into which the pots were set, and were not charged by the defendant with the duty of providing for the pots reasonably safe and suitable covering, railing or other device to protect plaintiff from slipping or falling into the same, and were not charged by the defendant with the duty of providing and properly placing reasonably safe and sufficient hoisting apparatus for plaintiff's use in elevating said masses of grease and lubricant matter to the top surface of the said furnace structure, and were not charged by your petitioner with the duty of properly instructing the plaintiff as to the manner of performing said plaintiff's duties, and it is not true that the said defendants Schenk and Wettengel or either of them negligently failed to carry out the said alleged duties mentioned in plaintiff's petition or any of them; and it appears from the face of the plaintiff's said petition that the said plaintiff was not injured by reason of the failure of the said Schenk and Wettengel or either of them to perform any of the said duties alleged against them, but was injured from other and different grounds.

And your petitioner further avers that the said Harry Schenk being a citizen of the State of Illinois, that as to him and your petitioner, this suit is removable, and should be removed to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as herein prayed, and that as to the said George Wettengel, your petitioner charges and states the fact that he is improperly and fraudulently joined herein with your petitioner by the plaintiff in this suit, for the sole purpose of fraudulently and improperly preventing or attempting to prevent this petitioner from removing this cause to the United States Circuit Court in and for the Eastern Division of the Eastern District of the State of Missouri, as prayed for herein, and for no other purpose, and that the said plaintiff well knew at the time of the bringing of this suit that the said Wettengel was not in or about the place where the said plaintiff was injured at the time of the said injury; that he in no manner was in control or superintendent; that it was not his duty to plan the construction of the said furnace or to provide any covering, railing or other device in and about said pots or to provide reasonably safe and sufficient hoisting apparatus for plaintiff's use, but that the said plaintiff with this knowledge joined the said Wettengel herein solely to prevent the removal of this cause, and not in good faith.

And your petitioner further states that the petition herein states no cause of action against said Wettengel.

And your petitioner shows that by reason of the premises it desires and is entitled to have the said suit removed from the Circuit Court of the City of St. Louis, Missouri, into the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri.

And your petitioner offers herewith a bond with good and sufficient surety, for its entering in the Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, on the first day of its next term, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court of the United States, if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this Honorable Court to provide no further order herein, except to make an order for the removal of this cause to the said Circuit Court of the United States for the Eastern Division of the Eastern District of the State of Missouri, and to accept the said surety and bond, and to cause the record herein to be removed to the said Circuit Court of the United States, as herein prayed for."

This petition is verified by the affidavit of one Merritt U. Hayden.

THE MOTION TO REMAND.

Plaintiff's motion to remand, omitting the caption is as follows: (Trans., p. 14.)

> "Now comes the plaintiff in the above entitled cause and moves that the court remand same to the Circuit Court for the City of St. Louis, State of Missouri, because
>
> 1. There is not in said cause a controversy wholly between citizens of different states and which can be wholly decided between them.
>
> 2. There is not in said cause a separate controversy which is wholly between the said plaintiff and the said defendant, The National Enameling and Stamping Co., and which may be wholly determined between them without the said co-defendants being parties thereto.
>
> 3. The said defendant, George Wettengel, was not improperly and fraudulently joined as defendant herein for the purpose of fraudulently and improperly preventing, or attempting to prevent, the removal of this cause to this court."

AFFIDAVITS IN SUPPORT OF AND AGAINST MOTION TO REMAND.

In support of plaintiff's motion to remand, there was filed, omitting the caption, the following affidavit: (Trans., p. 16.)

> "Conrad Wecker, being duly sworn on his oath, says: That he was in the employment of the defendant, The National Enameling and Stamping Co., prior to and up to the time of the construction of the furnace structure mentioned in plaintiff's petition filed herein; and that George Eisenmayer was, prior to and up to the time of the construction of said structure, in the employment of said defendant company, and was charged with the general supervision of the work and business of the said company at the place at which plaintiff was employed and at which he received his injuries, as set forth in his petition filed herein. That just prior to the construction of the said furnace structure the plaintiff heard the said Eisenmayer direct the said defendant George Wettengel to prepare plans for a furnace structure to be erected upon the spot whereupon was shortly afterwards erected the furnace structure upon which plaintiff was at work when he received the injuries set forth in his petition; that plaintiff at the time he filed his petition herein believed, and still believes, that the said defendant George Wettengel planned and directed the construction of the said furnace structure as set forth in plaintiff's petition filed herein.
>
> CONRAD WECKER."

Against the motion to remand, there were filed, omitting captions, the following affidavits: (Trans., pp. 17, 18, 19.)

"George Eisenmayer being first duly sworn on his oath says that on the 12th day of November, 1902, and for some years previous thereto, he was in the employ of the National Enameling and Stamping Co., in the capacity of chief engineer, that as such chief engineer affiant was charged, among other things, with the duty of seeing to the repairs of the apparatus used by the defendant and also planning any new apparatus that was about to be adopted. Affiant further states that during said period it was customary for the National Enameling and Stamping Co. to do all or most of its own work, in connection with repairs and construction, and affiant states that in order to get proper execution of such work of repairs and construction George Wettengel was employed in the office of defendant as a draftsman, and that several other persons were employed in the said office as draftsmen. And affiant further states that the sole work of said George Wettengel, during the period above mentioned, was that of draftsman and that said George Wettengel had nothing to do with selecting plans and approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics.

And affiant further states that said George Wettengel, during said period, had no authority to employ or discharge men, or no authority whatever to superintend the work of any of the men, nor authority to give instructions to any of the men as to how they should do their work, and further affiant saith not.

GEO. F. EISENMAYER."

"George Wettengel being first duly sworn on his oath says that he is 28 years of age, and is one of the defendants in the above suit. Affiant states that at the time mentioned in plaintiff's petition, to-wit: The 12th day of November, 1902, and for about ten years previous thereto, affiant had been employed by the National Enameling and Stamping Company as a draftsman; that all his work was done in the office of said company, and that he had no work whatever outside of the office, and was not thrown in contact with the employees outside of the office, or with the plaintiff, and was charged with no duty whatever of superintendence in connection with the work of the outside employes, or with the plaintiff, at the time of said accident, or for several years previous thereto.

Affiant further states that he was not charged, at the time of said accident, or for several years previous thereto, with any duty of designing or planning the apparatus that was used in

the defendant's plant, but that the designing of all apparatus, and the selection of apparatus was made by other persons, and that the sole duty of affiant, at the time of said accident, and for several years previous thereto, was to attend to the mechanical work of drafting which was based exclusively upon the ideas and plans adopted by other persons. And affiant further states that he had no discretion whatever as to what sort of apparatus should be used in any part of defendant's plant; and with reference to the particular pots mentioned in plaintiff's petition, and into one of which plaintiff claims he fell, affiant states he had nothing to do with planning said pots, and had no right whatever to determine what sort of pots should be used, or whether a railing should be used, in connection with the same, or what sort of hoisting apparatus should be used.

And affiant further states that he is charged with no duty by defendant, in connection with the plaintiff, as to how and when he should do his work, but that affiant had no authority whatever to give any instructions. In short, affiant states that his position was a clerical position in the office, and his duties were confined to the actual making of drawings to enable mechanics to do construction work upon the basis of plans adopted by other persons than affiant in the employ of defendant. And affiant further states that there is no ground whatever for the suit of Conrad Wecker against affiant, and that in truth and in fact there is no possible ground upon which any charge can be made against this affiant in connection with the accident set out in plaintiff's petition, which occurred on November 12, 1902.

Affiant further states that at the time of the said accident, and for several years previous thereto, he did not know the plaintiff, Conrad Wecker, by name, and did not know what sort of work he was doing, or in what part of the defendant's plant he was engaged. And affiant further states that he was never thrown in contact with said Conrad Wecker in his work and was charged with no duty whatever of superintending the work of said Conrad Wecker or instructing the said Conrad Wecker how to do his work, and further affiant saith not.

GEO. WETTENGEL."

COURT'S OPINION IN OVERRULING MOTION TO REMAND.

The court overruled the motion to remand on December 22nd, 1904 (Trans., p. 15). And in overruling the motion delivered the following opinion, omitting caption: (Trans., pp. 25-27.)

"ADAMS, District Judge:

This action was instituted by the plaintiff in one of the Circuit Courts of the State. He charged in his complaint that he was employed by the defendant corporation to work about certain large metal pots used for the melting of grease and lubricant matter; that the corporation failed to use proper care to furnish a reasonably safe place for his work, or reasonably safe appliances with which he should work. The negligence is particularized as follows: That the corporation failed to provide the metallic pots with any covering, railing or other device to protect its servants from liability to fall into them. It is observed from this general statement, that the negligence charged against the corporation is a failure to perform that positive duty which the law imposes upon a master to provide a reasonably safe place and reasonably safe appliances for use of its servants.

After setting forth the facts already referred to the plaintiff avers: That the individual defendant Wettengel was employed by the corporation and charged with the duty of planning and constructing the bank of metallic pots, and with the duty of seeing that they were safely covered, railed off or otherwise protected, so that the employes might not be unreasonably exposed to danger; that as a result of what complainant denominates the joint negligence of both the corporation and Wettengel, he was precipitated into one of these metallic pots and injured.

In due course, the defendant corporation filed its motion to remove the cause from the state court to this court, alleging in its petition that the plaintiff was a resident of the State of Missouri; that the defendant corporation was a citizen of the State of New Jersey, and that defendant Wettengel was a citizen of the State of Missouri, and alleging further that defendant Wettengel was fraudulently joined as a defendant for the purpose of improperly preventing the removal of the cause to this court, and that there is a separable controversy within the meaning of the Judiciary Act of 1887, as amended by the Act of 1888, wholly between the plaintiff and the defendant corporation, which can be fully determined as between them, and with respect to which the defendant Wettengel has no concern.

Upon the filing of such a petition in the state court the cause was ordered removed to this court. The plaintiff now comes and moves to remand the cause to the state court on the grounds as alleged: (1) That Wettengel was not fraudulently joined as defendant for the purpose of preventing removal, and (2) that no separable controversy between the

plaintiff and the defendant corporation is disclosed by the complainant.

Plaintiff contends that the defendant corporation and the defendant Wettengel are properly joined, because they are charged to be joint tort feasors, and because both are liable to the plaintiff for the injury which he has sustained. The defendant contends that there is no liability stated as against defendant Wettengel, that the only liability stated in the pleading is against the corporation, and that as a result thereof the case was properly removed.

I have, as is well known by the bar, frequently ruled: That where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right (to remand?) of removal exists and can not be defeated by any showing alinude the complaint itself, that the two were not jointly liable. Such rulings have always been predicated upon the averments of the complaint as they there appear. But where a complaint discloses the fact that there can be no joint liability and that an allegation of that sort is groundless and fictitious, then such an allegation can not deprive the non-resident defendant of his right to remove the cause. Referring again to the averments of the complaint, it appears that the charges: That the defendant corporation failed to perform its duty in the matter of providing a reasonably safe place for the plaintiff to work, and that the defendant Wettengel was the agent of the corporation in the matter of making this provision. In other words the defendant Wettengel is charged in the complaint to have been acting within the scope of his duty as agent in the performance of one of the fundamental and positive duties of the master. He is charged with negligence merely—is not charged with wantonness, recklessness or other active misconduct. Does such a complaint disclose any cause of action at all against the agent? I think not. The only charge against him in legal effect is: That he failed to use reasonable care in doing the work of his principal. Such failure is a proper definition of negligence. Negligence is negative in character. It is the omission to perform some duty. Milwaukee R. R. Co. v. Ames, 91 U. S. 489. It implies nonfeasance as distinguished from mis-feasance. It certainly does not imply wantonness or recklessness or express malice. For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable. Story on Agency, 9th Ed. 308, 309; Kelly v. C. & A. Railway Co., 122 Fed. 286; Davenport v. Southern Railway Co., 124 Fed. 983; Shaffer v. Union Brick Co.,

128 Fed. 97; Helms v. N. P. Ry. Co., 120 Fed. 389, and cases therein cited.

The complaint itself shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. In the light of the averments of the case just referred to, the general broad statement of the legal conclusion that plaintiff was injured by the joint negligence of both the corporation and Wettengel, can have no effect.

The views already expressed are in harmony with the opinion of the Supreme Court of the United States in Chesapeake & Ohio Railway Company v. Dixon, 179 U. S. 131. Certain expressions are there employed which might give color to the contention of the plaintiff in this case. The court held in that case that the right of removal did not exist. In other words it held that the charge of concurrent negligence on the part of the railroad company and the engineer, might, so far as the petition disclosed, exist. The court there says; 'The negligence may have consisted in the fact that the train was run at too great speed; and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurring negligence may be imagined. And where concurring negligence is charged the controversy is not separable.' It seems obvious from the foregoing language that if the plaintiff in the Dixon case had charged that the only act of negligence was the running of the train at an excessive rate of speed, and that the company acted in the matter of operating the train solely by and through its agent the engineer, a different result would have been reached. As I understand that case, the conclusion reached, was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence.

I am therefore disposed to apply the doctrine of the case of Bank of Arapahoe v. Bradley, 72 Fed. 867, 872, and to hold that the joining of the individual defendant with the corporation in this case, is probably groundless and fictitious, and obviously intended to unlawfully deprive the defendant of the right given him to remove its cause into this court for trial. There is disclosed in the complaint but one cause of action and that is against the corporation.

The motion to remand is denied."

COURT'S ADDITIONAL OPINION DELIVERED ABOUT FOUR MONTHS LATER.

In overruling the plaintiff's motion in arrest, *about four months after* rendering the foregoing opinion, to-wit, April 18, 1905 (Trans., p. 21), the court delivered the following additional opinion: (Trans., p. 27.)

> "ADAMS, J.:
>
> The opinion rendered heretofore on the motion to remand made no allusion to the affidavits filed, tending to show the fictitious and fraudulent joining of defendant Wettengel, and it is sufficient now to say that they inevitably show that the inferences drawn from the allegations of the petition are correct.
>
> These affidavits may be considered on the question involved in the motion. Enstofen v. Chicago, R. I. & P. Ry. Co., 128 Fed. 85."

CERTIFICATE AS TO JURISDICTIONAL QUESTION.

The court below, upon being requested to certify the jurisdictional question to this court, made the following certificate, omitting caption: (Trans., p. 22.)

> "I, Elmer B. Adams, Judge of said court, hereby certify that the only question decided by the court in this cause is that the joining of defendant Wettengel as co-defendant with defendant National Enameling & Stamping Company, was palpably groundless and fictitious, and done for the purpose of unlawfully depriving the defendant Stamping Company of its right to remove the cause to this court for trial. For this reason the motion to remand the cause to the state court was denied. In deciding this motion the court took into consideration, not only the complaint and petition for removal, but the affidavits filed in support and opposition to the motion to remand. The plaintiff refused to submit to the jurisdiction of this court and suffered a dismissal of the suit for want of prosecution. The question is whether this court had jurisdiction of the action.
>
> Witness my hand this 26th day of April, A. D. 1905.
>
> ELMER B. ADAMS, Judge."

SPECIFICATION OF ERRORS.

First. The court erred in denying the plaintiff's motion to remand the cause to the Circuit Court for the City of St. Louis, State of Missouri.

Second. The court erred in holding that plaintiff in his petition does not state a joint cause of action against the said defendants, The National Enameling and Stamping Company and George Wettengel.

Third. The court erred in holding that plaintiff's complaint herein discloses but one cause of action and that against the defendant corporation.

Fourth. The court erred in conceiving that there is in said suit any controversy wholly between citizens of different states and which could wholly be determined between them.

Fifth. The court erred in dismissing plaintiff's petition and entering judgment in favor of defendants.

BRIEF OF THE ARGUMENT.

POINTS AND AUTHORITIES.

I.

The complaint discloses a joint cause of action against the master, the non-resident defendant, and the servant the resident defendant, in alleging plaintiff's injury as a result of their joint negligence; since a servant, as well as his master, is liable to third persons for injuries resulting not only from the servant's wilfulness, wantonness or recklessness, but also for injuries resulting from the servant's negligence in the performance of any task which the servant has actually undertaken.

(The following cases are referred to in the argument below):

Alabama Gt. Southern v. Thompson (U. S. Sup. Ct., Jan. 2, 1906), 26 Sup. Ct. Rep. 161;
C. & O. Ry. Co. v. Dixon, 179 U. S. 131;
Powers v. Ry. Co., 169 U. S. 92, l. c. 96-97;
Dougherty v. Atchison etc. Ry. Co., 126 Fed. 239;
Fogarty v. Ry. Co., 123 Fed. 973;
American Bridge Co. v. Hunt, 130 Fed. 302;
Hukill v. Ry. Co., 72 Fed. 745, 753;
Harriman v. Stowe, 57 Mo. 93;
Lottman v. Barnett, 62 Mo. 159;
Martin v. Benoist, 20 Mo. App. 262, 270;
Osborne v. Morgan, 130 Mass. 102;
Mayer v. Thompson etc., 104 Ala. 611;
Greenburg v. Whitcomb Lbr. Co., 90 Wis. 225;
Donnelly v. Huffschmidt, 79 Cal. 74;
Horner v. Lawrence, 37 N. J. L. 46;
Ellis v. McNaughton, 76 Mich. 237, 241;
Griffiths v. Wolfraum, 22 Minn. 185.

The following authorities, though not referred to in the argument, are to the same effect on the foregoing proposition:

C. N. O. & T. P. Ry. Co. v. Bohn, 26 Sup. Ct. Rep. 166;
Southern Ry. Co. v. Carson, 194 U. S. 136;
Dougherty v. Ry. Co., 122 Fed. 205;
Warax v. Ry. Co., 72 Fed. 637, 640;
Andrews v. Boedica, 126 Ill. 605;

Lough v. John Davis, 59 L. R. A. 802 (Wash.);
Bell v. Josselyn (Mass.), 3 Gray 309, l. c. 311;
Campbell v. Portland Sugar Co., 62 Me. 552;
Thompson's Commentaries on the Law of Negligence, Vol. 5, Sec. 5771;
Mechin on Agency, Secs. 571, 572;
Sherman & Redfield on Negligence, 5th Ed., Vol. I, Sec. 244.

II.

That negligence for which a servant is liable to a third person, that is, misfeasance, may consist not only in an act directly injurious to such person, but may as well consist in a negligent omission in the course of some task which the servant has undertaken, as a result of which negligent omission, such third person is injured.

Osborne v. Morgan, 130 Mass. 102;
Harriman v. Stowe, 57 Mo. 93;
Lottman v. Barnett, 62 Mo. 159;
Bell v. Josselyn, 3 Gray l. c. 311;
Donnelly v. Huffschmidt, 79 Cal. 74;
Hukill v. Ry., 72 Fed. l. c. 753;
Horner v. Lawrence, 37 N. J. L. 46;
Ellis v. McNaughton, 76 Mich. 241;
Griffiths v. Wolfraum, 22 Minn. 185;
Campbell v. Portland Sugar Co., 62 Me. 552;
Thompson's Commentaries on the Law of Negligence, Vol. 5, Sec. 5771.

III.

In order to justify removal on the ground of improper joinder of the resident defendant, it was necessary for the removal petitioner to both allege and prove that the allegation of joint liability made in the complaint was fraudulently made There was no evidence even tending to show such fraud.

Alabama Gt. Southern v. Thompson, 26 Sup. Ct. Rep. l. c. 164;
Louisville, etc., Ry. Co. v. Wangelin, 132 U. S. 599, l. c. 601;
Plymouth, etc., Co. v. Amador, etc., Co., 118 U. S. 264, 270;
Hukill v. Ry. Co., 72 Fed. 745;
Warax v. Ry. Co., 72 Fed. 637;
Landis v. Felton et al., 73 Fed. l. c. 311;
Foster on Federal Procedure, Vol. II, p. 925, Sec. 384.

IV.

The affidavits filed by the non-resident defendant in opposition to the motion to remand and which the court in its certificate as to the jurisdictional question says that it took into consideration in deciding that the allegations of joint liability were fraudulent, do not even charge fraud or state any facts from which an inference of fraud may be drawn, or even negative the joint liability made out by the allegations of the petition. (See affidavits, Trans., pp. 17, 18 and 19.)

ARGUMENT.

I.

A SERVANT LIABLE FOR INJURY TO THIRD PERSONS RESULTING FROM HIS NEGLIGENT ACTS OR OMISSIONS IN THE COURSE OF HIS EMPLOYMENT.

The complaint in this case does not charge the defendants with wantonness or recklessness or express malice. It only charges the defendants with negligence. For this reason, it was held by the court below that complaint discloses no cause of action against the resident defendant, the servant, but only a cause of action against the employer, the non-resident defendant. The holding of the court below is in this language (Trans., p. 26):

> "For acts of mere negligence without wantonness or express malice, the servant incurs no liability to a third person, the master alone is liable."

This conclusion is obviously inconsistent with principles of law which the court below itself in the course of its opinion recognizes as unquestioned. It is not only contrary to the overwhelming weight of authority, but we do not think that any authority can be cited which really supports such a proposition. The court below in the course of its opinion recognizes the joint liability of master and servant for the negligence of the servant in the following language (Trans., p. 26):

> "I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal (meaning evidently the right to remand) exists and cannot be defeated by any showing aliunde the complaint itself, that the two were not jointly liable."

The court in commenting on the case of C. & O. Ry. Co. v. Dixon, also says (Trans., p. 27):

> "As I understand that case, the conclusion reached was based upon the facts appearing in the complaint, that a joint act of negligence was charged and no showing was otherwise made in the complaint negativing the joint and concurrent act of negligence."

After thus clearly recognizing the principle announced in the Dixon case, that the action is joint, that the right of removal does not exist, and that the cause should be remanded where there is, in the complaint, in appropriate language a charge of joint negligence against the master and servant, the court proceeds further to hold that, since upon analysis of the complaint, it appears that master and servant are charged jointly with joint negligence only, no joint cause of action is stated since the servant is not liable to third persons for negligence, but only for recklessness, wantonness, or express malice. If the servant is not at all liable to third persons for negligence, how can the court below justify its course in that it has "frequently ruled that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence," a joint cause of action is stated, if the complaint does not upon further examination disclose a want of joint liability. If the servant is jointly charged with the master with something for which the servant is not liable to the complainant, to-wit, negligence, why is it necessary to examine further into the complaint in order to determine whether by other allegations a want of joint liability is disclosed. The rule laid down by the court below leads inevitably to the conclusion that it is disclosed at the very outset. What then could be more inconsistent than the ruling of the court below that where the complaint charges joint negligence and shows nothing more, a joint cause of action is stated, but if the complaint upon analysis shows specific allegations of the same thing, to-wit, joint negligence only, no cause of action is stated? The court below does not arrive at this conclusion as the result of any distinction drawn from the specific allegations of the complaint between actual and imputed negligence of the manter, but contents itself with a course of reasoning which leads to the bald, self-contradictory proposition just stated.

The court below, in support of the proposition that a servant is not liable to third persons for his negligence, cites the following authorities:

Story on Agency, 9th Ed. 308, 309;
Kelly v. C. & A. Ry. Co., 122 Fed. 286;
Davenport v. Southern Ry. Co., 124 Fed. 983;
Shaffer v. Union Brick Co., 128 Fed. 97;
Helms v. N. P. Ry. Co., 120 Fed. 389.

A brief examination of these authorities will disclose that they do not support that proposition:

Story in his work on Agency in the section cited by the court below merely announces the proposition that an agent is liable to third persons only for misfeasance and not for mere nonfeasance in the performance of his duty. But Story does not by any means announce the proposition that, in order to be guilty of misfeasance, a servant or agent must be guilty of wantonness, recklessness or express malice.

Kelly v. C. & A. Ry. Co., 122 Fed. 286, was a suit against the railway company and one of its employes, a yardmaster, whose duty it was, under his contract with the company, to inspect engines. As a result of the failure of the individual defendant to inspect a certain engine, it was alleged that its boiler exploded, causing the injury complained of. It expressly appears from the opinion that the individual defendant

> "failed to make an inspection of the engine so as to ascertain its unsafe condition and that by reason of this neglect *in not making the inspection and repairs* (italics ours) the engine was not capable of standing the pressure of steam requisite to pull the train of cars in question and that the explosion ensued."

It was held there that the negligence charged was mere nonfeasance, for which the servant was not liable to third persons. It will be observed that it appears that the individual defendant did not undertake the performance of that task, did not enter upon the work of inspecting and repairing that engine. It is apprehended that, if it had been charged that the individual defendant actually entered upon that work and negligently inspected and repaired the engine, and that, as a result thereof, plaintiff was injured, the ruling of the court would have been different.

In the case of Davenport v. Ry. Co., 124 Fed. 983, cited by the court below, the complaint charged that the injuries sued for resulted from the joint "carelessness, negligence, recklessness, wantonness and wilfulness of the defendants," and the complaint itself disclosed that the actual recklessness, wantonness, etc., was that of the individual defendants, the servants, and that the master was chargeable only with imputed negligence. The court held that the master and servant were not liable in a joint action because,

1. There is no joint liability on the part of the master and servant when the negligence of the master is only imputed and not actual;

2. Since the complaint disclosed recklessness on the part of the servant, the measure of damages as against the master and servant would be different, and there was, therefore, no joint liability.

It thus appears that while the court below cites this case upon the proposition that there is no joint liability disclosed against the master and servant, *unless* the complaint charges recklessness, etc., the case cited is so far from supporting the proposition that it actually holds the contrary, to-wit, that there is no joint liability, if recklessness on the part of the servant *is* charged.

The case of Shaffer v. Union Brick Co., 128 Fed. 97, holds exactly contrary to the proposition upon which it is cited by the court below. It holds that both master and servant are liable for the negligence of the servant in the course of his employment; but unless there is actual negligence of the master concurring with that of the servant, they are not jointly liable. If the negligence of the master is only imputed, they are severally liable. However, upon this last point the decision was overruled by the recent decision of this court in Alabama Great Southern Ry. v. Thompson et al., supra.

In the case of Helms v. Ry. Co., 120 Fed. 389, the decision is the same as in the Shaffer case.

Not one of these decisions, it seems to us, appears [illegible] slightest degree to support the proposition laid down by the [illegible] below upon which they are cited, to-wit, that a servant is not liable to third persons for negligence in the course of his employment.

The question of liability of a servant to a third person for negligence in the course of his employment resulting in injury to such third person and the joint liability of the master and servant in such case, whether the negligence of the master be actual or imputed, is conclusively settled by a recent decision of this court in an opinion by Justice Day, in the case of Alabama Great Southern Ry. v. Thompson, decided January 2, 1906, 26 Sup. Ct. Rep. 161. In that case, the following questions were certified to this court by the court below:

> "(1) May a railroad corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servant, though not personally present or directing and not charged with any concurrent act of negligence?
>
> (2) Is such a suit removable by the corporation as a separable controversy when the amount involved exceeds $2000.00, exclusive of interest and costs, and the requisite diversity of citizenship exists between said company and the plaintiff, the citizenship of the individual defendant sued with the company as joint tort feasors, being identical with that of the plaintiff?"

This court, after a full and careful consideration and review of the authorities, answers in the following language (l. c. 166):

> "We answer the first question: That for the purpose of determining the right of removal, the cause of action must be deemed as joint. The views herein expressed lead to an answer to the second question in the negative."

The cases in which servants are held liable to third persons, where there is no charge of recklessness, wantonness, etc., but a charge only of negligence, are very numerous and of high authority. See authorities cited under Division I, Points and Authorities.

Among those cases in addition to the recent decision of this court just quoted from, the following are cases in which master and servant are held jointly liable where the charge is of negligence only.

> C. & O. v. Dixon, 179 U. S. 131;
> Powers v. C. & O. Ry., 169 U. S. l. c. 97;
> Dougherty v. Atchison, etc., 126 Fed. 239;
> Fogarty v. Ry. Co., 123 Fed. 973;
> Am. Bridge Co. v. Hunt, 130 Fed. 302.

In view of these authorities and of well recognized principles of the law of negligence, it is difficult to see how the court below could have arrived at the conclusion announced in its opinion,

> "that the joining of the individual defendant with the corporation in this case is probably groundless and fictitious and obviously intended to deprive the defendant of the right given it to remove its cause into this court for trial" (Trans., p. 27);

and how the court could have based such a conclusion entirely upon the proposition that the complaint discloses but one cause of action, in as much as it charges master and servant with negligence only. It is true the court, in a supplemental opinion handed down about four months after the opinion above referred to, sees fit to vouchsafe an additional reason for its ruling. This will be considered later.

The court below lays down the broad proposition that mere negligence is mere nonfeasance, for which the servant is not liable to third persons, and that in order to be guilty of misfeasance, for which he is liable, the servant must be guilty of negligence so gross as to amount to wantonness or recklessness, or must be guilty of express malice. Such definition of misfeasance and nonfeasance is not supported by the authorities. However, it may be well in this connection to consider the question: What is that negligence amounting to mere nonfeasance for which a servant is not liable to third persons, and what is that negligence amounting to misfeasance for which the servant is liable to third persons?

II.

THE NEGLIGENCE CHARGED IN THE COMPLAINT AMOUNTS TO MISFEASANCE.

We desire to preface what follows under this heading by saying that, while we think that the authorities referred to and discussed down to Division III, page — of this brief, show conclusively that the complaint herein states a joint cause of action and charges the defendant Wettengel, the servant, with negligence, which is not mere nonfeasance, it is nevertheless true, under the rule announced by this court in its recent decision in Alabama Great Southern v. Thompson, supra, that even though the plaintiff has misconceived his cause of action, and even though upon a proper presentation of the question this court might hold that the cause of action disclosed by the complaint is not really joint, it is yet joint for purposes of removal, if the complaint is in good faith. Upon that point, this court, in the recent case of Alabama Great Southern v. Thompson, says:

> "In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the State Court by the filing of a declaration in which he alleged a joint cause of action. Does this become a separable controversy within the meaning of the Act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think in the light of adjudications above cited from this court it does not. Upon the face of the complaint, the only pleading filed in the case, the action is joint. It may be that the State Court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine, if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separable controversy for the purpose of removal."

Therefore, the authorities discussed below down to Division III need be considered only upon the question—if there can be such a question—as to whether or not the allegations of the complaint itself so palpably disclose a want of joint liability as to justify the imputation that the allegation of joint liability was not made in good faith.

Much has been said about misfeasance and nonfeasance, and the courts and text-writers have not always clearly drawn the distinction between the two kinds of negligence. However, we think that it is now well settled by the great weight of authority

that, while a servant is not liable to a third person, if such third person is injured as the result of the servant's negligent failure to enter upon the performance of a task which the servant is under contract to perform for his master; yet, if the servant once undertakes the performance of a task, he is liable for any negligence in the course of the performance of that work, as a result of which a third person is injured, whether such negligence consists in a negligent act or a negligent omission.

Perhaps the leading case on that subject is the case of Osborne v. Morgan, 130 Mass. 102, 39 Am. R. 438. That was a case in which the defendant, acting as servant for another, suspended a block and chain from the ceiling and negligently left it in such an unsafe and insecure condition that it afterward fell and injured a fellow servant, the plaintiff in the case. The court below sustained a demurrer to the petition on the ground that the defendant's negligent act was mere nonfeasance for which he was liable only to his master. The Supreme Court of Massachusetts in an opinion by Chief Justice Gray, held that such negligence was not mere nonfeasance but amounted to misfeasance for which the servant was liable to a third person. In so holding, the court said:

> "It is often said in the books that an agent is responsible to third persons for misfeasance only and not for nonfeasance, and it is doubtless true that if an agent never does anything towards carrying out his contract with his principal but wholly omits or neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it his duty to use reasonable care in the manner of executing it so as not to cause any injury to third persons which may be the natural and probable consequence of his acts, and he cannot, by abandoning its execution midway and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance or doing nothing, but it is misfeasance and doing improperly.
>
> Ulpian on Dg. 9, 2, 27, 9;
> Parsons v. Winchell, 5 Cuch. 592;
> Bell v. Josselyn, 3 Gray 309;
> Navel v. Wright, 3 Allen 166;
> Horner v. Lawrence, 8 Vroom 46 ***

The fact that a wrongful act is a breach of contract between the wrongdoer and one person does not exempt him

from responsibility, for it is a tort to a third person injured thereby."

The case of Kelly v. Ry. Co., 122 Fed. 286, cited by the court below, furnishes a good illustration of negligence which amounts to nonfeasance only. In that case, the individual defendant was employed to inspect and repair engines. It appears that the individual defendant did not enter at all upon the work of inspecting and repairing the particular engine on account of the defect in which the plaintiff was injured. It was alleged,

> "that by reason of this negligence *in not making the inspection and repairs* (italics ours) the engine was not capable of standing the pressure of steam requisite to pull the train of cars in question and that the explosion ensued."

But in the case at bar it appears form the complaint that the individual defendant is charged with having actually entered upon the performance of the work in question and with being guilty of negligence in the course of the performance of that work. The petition, after setting forth the duties with which the individual defendant was charged by the master, proceeds further to charge (See trans. p. 5) that the individual defendant

> "negligently planned and directed the construction of the said furnace structure into which the said pots were set, so that same was not a reasonably safe place for plaintiff to work in the performance of his aforesaid duties."

So that in the case at bar, it clearly appears from the complaint that, if the plaintiff was injured as the result of a negligent omission of the individual defendant, that negligent omission occurred in the course of the performance of a work which the individual defendant had actually undertaken, to wit, the planning and direction of the construction of that furnace structure.

That such a negligent omission in the course of work which the servant has undertaken constitutes misfeasance for which the servant is liable to third persons has been often decided.

In the case of Hukill v. Ry. Co., 72 Fed. l. c. 753, it appears that the individual defendant was charged in the complaint with having negligently left a car upon the sidetrack with a board projecting therefrom in a defective, unsafe and dangerous condition, whereby the plaintiff was injured. It was there contended that the negligent failure of the individual defendant to put the car in a safe condition was mere nonfeasance. It was held otherwise. The court on page 753 says:

> "This was misfeasance, because, but for their act in placing the car where it was in its dangerous condition, the plaintiff would not have been injurrd. It is quite like the case considered by the Supreme Judicial Court of Massachusetts in Osborne v. Morgan, 130 Mass. 102. There it was held that a servant who attached a block and tackle to the ceiling in the

course of his employment, and did not sufficiently secure it to prevent its falling, was directly liable to a fellow servant who was injured by the fall. * * *

In much the same way, when the car inspectors moved this car into a place where its defective condition would in all probability injure some one, they were doing something improperly instead of doing nothing."

Likewise it may be said in the case at bar that when the individual defendant so planned and directed the construction of this furnace structure as to render it an unsafe and dangerous place at which to work and likely to prove injurious to any person employed about the structure, the defendant was guilty of misfeasance. The same rule of law has been recognized in the following cases:

Harriman v. Stowe, 57 Mo. 93. A case where the defendant, as agent of another, negligently constructed a door or hatchway through which plaintiff fell and was injured.

Lottman v. Barnett, 62 Mo. 166. A case where the defendant, as agent of another, in superintending the construction of a building negligently left a column therein in defective condition. Thereafter plaintiff was injured by the fall of the building.

Martin v. Benoist, 20 Mo. App. 263, 270. A case where defendant, as agent of another, constructed a tunnel for a sewer pipe along the foundation of plaintiff's cellar and negligently refilled the tunnel with loose dirt through which the water percolated into plaintiff's cellar to plaintiff's injury.

Greenburg v. Whitcomb Lbr. Co., 90 Wis. 225. A case where an agent charged with the duty of providing machinery set plaintiff to work at a machine which the agent knew to be dangerous.

Dougherty v. Atchison, etc., Ry. Co., 126 Fed. 239. A case where the defendant, the conductor of a train, received an insane person as a passenger without an attendant and negligently failed to put such insane person under control upon complaint of the plaintiff.

Mayer v. Building Co., 104 Ala. 611. A case where defendant, as agent or employee of another, negligently constructed a wall, as a result of which plaintiff, a third person, was injured by a falling brick.

Horner v. Lawrence, 27 N. J. L. 46. A case where the defendant, as agent or employee of another, negligently left down a gap through which the hogs of the third person escaped and were killed.

Donnelly v. Huffschmidt, 79 Cal. 74. A case where defendants, as agents or employees of another, in the repairing of a range located in the house in which plaintiff lodged as a tenant, negligently left a box in the pathway over which the plaintiff stumbled in the dark and was injured.

Ellis v. McNaughton, 76 Mich. 241. A case in which defendant, as agent of another, in the construction of a building, negligently left a walk in the front in an unsafe condition as a result of which plaintiff was injured.

Griffiths v. Wolfraum, 22 Minn. 185. A case where defendants, as agents of another, were employed to construct a wooden framework over which an arch of masonry was to be built. As a result of negligence of the defendants in the construction of this framework, it fell, injuring plaintiff, a third person.

In all of these cases and in many others to which the court might be referred, it has been held that when one has been injured as the result of negligence of some person in the employment of another, the person so injured is entitled to recover, even though his injury resulted not from any intentional act nor from any positive act of the servant, but merely from the negligent omission of the servant in the course of the work which the servant had undertaken to do. It seems to be well settled that a negligent omission under such circumstances is just as much a misfeasance as is a negligent act.

We think that the foregoing authorities show, past all question, that the plaintiff in his petition states a joint cause of action against the resident and non-resident defendants in this case. We so construe the decisions; but even if we are wrong in this view of the law, it is sufficient, under the rule announced by the court in Alabama Great Southern v. Thompson, *supra,* if the authorities even so far justify this view as to relieve plaintiff and his counsel from the imputation that the allegations of the complaint itself so clearly disclose a want of joint liability that a claim of such liability is obviously in bad faith.

The rule above referred to in Alabama Great Southern v. Thompson had been previously recognized in a number of cases and quite clearly by Justice Brewer in the following language used in Hax v. Caspar, 31 Fed. 499:

> "Nor is there any propriety in the court now considering the sufficiency of this complaint as a complaint. Whether it does or does not state a cause of action is not a question to be considered on the motion to remand. That is a matter which the court in which the proceedings are finally tried has a right to determine, and no court, upon a motion to remand, ought to consider the sufficiency or insufficiency of the bill. It is enough that the plaintiff in the state court has stated what seems to be a single cause of action, affecting, perhaps, differently, different defendants, but still only a single cause of action; and that it does not appear that any defendant is collusively or improperly joined to prevent a removal."

III.

NO PROOF THAT THE INDIVIDUAL DEFENDANT WAS FRAUDULENTLY JOINED IN THIS CASE.

The court's opinion overruling the motion to remand in this case was delivered December 22nd, 1904 (Trans., p. 15). It appears from the opinion itself (Trans., pp. 25-27) that the court's action was based entirely upon the ground that the complaint upon its face stated no joint cause of action, and upon that ground the court in that opinion held that the joining of the individual defendant "is probably groundless and fictitious and obviously intended to deprive the defendant of the right to remove its cause into this court for trial." Afterwards, about four months later, on the 18th day of April, 1905 (see Trans., p. 21), the court overruled plaintiff's motion in arrest of judgment and in overruling the motion in arrest of judgment rendered the supplemental opinion appearing on page 27 of the transcript, in which the court says that the affidavits filed upon the motion to remand "inevitably show that the inferences drawn from the allegations in the petition are correct." What is the inference which the court draws from the allegations of the petition? It is that inasmuch as the individual defendant does not appear from the allegations of the petition to have been guilty of recklessness, wantonness or express malice, but of negligence only, it was fraudulent for the plaintiff to join the individual defendant. If that inference is correct, that is, if such conduct on the part of the plaintiff constitutes fraud, then it may be true that the affidavits tend to support that inference; but the decisions of this court and other courts cited in the foregoing part of this brief show conclusively that that inference is not correct, that the plaintiff had a right to join the individual defendant, even though he appears to have been guilty of negligence only. However, in refusing to remand the case, while there were on file at the time the affidavits referred to, the court clearly based its ruling upon the petition itself. This appears from examination of the court's first opinion. The court was at that time clearly of the opinion that it was improper for the court to consider anything aliunde the complaint itself. The court says: (Trans., p. 26.)

> "I have, as is well known by the bar, frequently ruled: that where a complaint charges in appropriate language that a corporation and an individual are jointly guilty of an act of negligence, and where the complaint itself does not disclose a want of joint liability, the right of removal [to remand] exists and can not be defeated by any showing aliunde the complaint itself, that the two were not jointly liable. Such rulings have always been predicated upon the averments of the complaint as they there appear."

Then the court proceeds to analyze the complaint and, as pointed out in the preceding part of this brief, arrives at the conclusion that the complaint itself discloses no joint cause of action. The affidavits referred to, which appear on pages 17-19 of the transcript, may tend to support the inferences which the court draws, as much as does the complaint from which the court originally drew those inferences; but we submit that neither the complaint nor the affidavits justify the serious imputation of fraud and misconduct which the court has cast upon the plaintiff and his counsel. If the affidavits referred to are examined by this court, it will be observed that, while those affidavits partially deny the existence of the facts set up in the complaint, they do not state that plaintiff or his counsel knew that any of the allegations of the complaint were false, nor that any of the allegations of the complaint were not made in good faith and with the expectation of proving them. The mere fact that plaintiff has made allegations which are not true, if he has done so, should not subject him to the charge of fraud, unless those allegations were known to be false. It is not necessary to cite any authorities upon the proposition that an allegation which is untrue is not for that reason necessarily fraudulent. It is well settled that such allegation is not fraudulent unless known to be untrue. The affidavits, therefore, do not charge the plaintiff with any fraud. There was no oral testimony heard on the motion to remand. It appears that the court below drew the inference in question solely from the complaint and the affidavits. This court is, therefore, in the same position as the court below to pass upon the question as to whether that complaint and those affidavits show any fraud.

Plaintiff in his affidavit (Trans., p. 16) says that one Eisenmayer was the general superintendent of the defendant company; that he heard Eisenmayer direct the defendant Wettengel to prepare plans for a furnace structure to be erected upon the spot whereon was shortly afterward erected the furnace structure in question; that at the time of filing his petition plaintiff believed and still believes defendant Wettengel planned and directed the construction of that furnace structure. If this be true, plaintiff was justified in attempting to hold Wettengel jointly liable with his employer. The affidavits of Eisenmayer and Wettengel, filed by defendants (Trans., pp. 17-19) do not even deny plaintiff's claim that Wettengel, the individual defendant, performed a part in the construction of the furnace structure in question. Much less do they tend to show that plaintiff had no good reason to believe and was guilty of fraud in alleging that defendant Wettengel was responsible for the manner in which the structure in question was constructed. It is alleged in the affidavit of Eisenmayer that he was the superintendent; he was the person who originated the plans and ideas and

"that the sole work of Wettengel, during the period above

mentioned was that of draftsman and that said George Wettengel had nothing to do with selecting plans or approving plans, but that his sole work was to take plans and ideas given to him, and to make the necessary drawings for the use of the mechanics."

Wettengel's affidavit is to the same effect. These affidavits then are not even a denial of the allegations of the petition, that defendant Wettengel was charged by the defendant corporation with the duty of "properly planning the construction of the said furnace structure into which the said pots were set," and that he "negligently planned and directed the construction of the said furnace structure into which the said pots were set so that same was not a reasonably safe place for plaintiff to work." The affidavits are a qualified admission of those allegations, and the claim made in the affidavits that Wettengel acted upon ideas originated by Eisenmayer is purely argumentative and only raises a question as to what is the legal effect of Wettengel having acted in the preparation of those plans not entirely upon his own ideas but wholly or in part upon the suggestions of another. It is admitted that it was Wettengel's work "to make the necessary drawings for the use of mechanics." This being true, it is obviously a question for the determination of the court to which the cause is finally submitted as to whether or not Wettengel's liability for the manner in which the furnace was constructed is at all affected by the question as to whether he himself originated the ideas in accordance with which those drawings were made by him or as to whether those ideas were originated by another. However, we will here take occasion to remark that where one is injured as the result of exposure to the risk of working in a place or with an appliance not reasonably safe, it would be imposing a novel and unusual burden upon the injured party to require him to trace down to its origin the "idea" in accordance with which the appliance or place was made defective or dangerous. In the case, for instance, of Osborne v. Morgan (*supra*), where a servant was held liable to another servant for an injury resulting from a negligently hung block and tackle, we apprehend that the judge who wrote that opinion would have given little weight to a plea that the defendant in hanging the block and tackle acted in accordance with "ideas" originated by another. But be that as it may, the affidavits in question were filed by the defendant for the evident purpose of showing that as a matter of fact the individual defendant is not liable as charged. The court below in its first opinion refuses to consider them for that purpose, announcing that it has been its rule to hold that where joint negligence is charged in appropriate terms and the complaint itself does not disclose a want of joint liability, the right to have the cause remanded "can not be defeated by any showing aliunde the complaint itself that the two were not jointly liable. *Such rulings have*

always been predicated upon the averments of the complaint as they there appear." The court then proceeds to analyze the complaint itself and concludes, "The *complaint itself* shows too much for the plaintiff's purposes. It clearly states him out of court as to defendant Wettengel. And upon this conclusion bases its ruling and inference that the allegations of joint liability were fraudulently made. Four months later, the court mentions the affidavits which at the time of its original ruling it refused to consider, and says that the affidavits tend to support the conclusion which the court previously drew that the allegations of the petition as to joint liability were fraudulent. The court draws from the complaint the inference that the injury suffered by plaintiff was due to mere negligence of the individual defendant and not to any recklessness, wantonness or express malice, and that for this reason it was fraudulent for plaintiff to charge the individual defendant with joint liability. The affidavits, like the original complaint, fail to show reckless or wanton injury of plaintiff by the individual defendant, and to this extent, and this extent only, do the affidavits tend to support the inference drawn by the court. Defendant's affidavits were not considered by the court below for the purpose for which they were evidently originally filed, to-wit, for the purpose of showing a want of joint liability aliunde the complaint itself. Four months after its original ruling, the court adverts to them for a purpose for which they were obviously not intended, to-wit, for the purpose of showing that plaintiff was guilty of fraud in alleging joint liability. If these affidavits had been intended for any such purpose, it would have been alleged by the affiant that plaintiff at the time of filing his petition knew that the "ideas" put into effect in the construction of the furnace structure were not original with Wettengel, and that plaintiff knew of the truth of other statements contained in the affidavits intended to show a want of liability on Wettengel's part. But the affidavits filed in support of the removal petition do not thus or in any way charge plaintiff with guilty knowledge of the falsity of any allegation of his petition.

It is well settled that upon a motion to remand, where the plaintiff has stated in his complaint a joint cause of action against the resident and non-resident defendants, the burden is upon the removal petitioner both to allege and to prove that the plaintiff was guilty of fraud in making his allegation of joint liability.

In Landers v. Felton, 73 Fed. l. c. 313, it is said:

> "The averments of the petition do, however, justify the joinder of the Southern Railway Company with the receiver. The petition for removal seeks to question the bona fide character of these averments. The petition is verified by the re-

ceiver, but no evidence is offered to show that these averments were fraudulently made, unless the affidavit of the receiver to the petition can be regarded as such proof. I do not think that it can be. If such an averment is to be proven, it should be by circumstantial and detailed evidence, so that the court may judge whether the charge of bad faith in the averments, for that purpose of evading the jurisdiction of the court, is sustained. The burden in such a case, and on such an issue, is, of course, upon the removing party."

In Alabama Great Southern Ry. Co. v. Thompson, *supra, l. c.* 164, it is said:

"It is equally well settled that in any case the question whether there is a separable controversy which will warrant a removal is to be determined by the condition of the record in the state court at the time of the filing of the petition for removal, independently of the allegations in that petition, or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court."

In the case of Warax v. C. N. O. & T. P. Ry. Co., 72 Fed. 640, it appeared that the resident defendant, an engineer, had been joined with the non-resident defendant, a railway company. It was charged that such joinder was improper. The court, upon that proposition (l. c. 640) said:

"In order that such joinder be regarded as fraudulent, it must appear by allegation and proof, not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the petition upon which the right to join the defendants is claimed are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. No proof is offered in this case, except the fact that suit was once brought on the same cause of action against the Railroad Company without joining Snyder the engineer. This may be regarded as a circumstance tending to show that the purpose in joining Snyder was to avoid the jurisdiction of the federal court, but it does not show, or have any tendency to show, that the averments of the petition with respect to Snyder upon which the right to join Snyder is asserted, were unfounded in fact. One who has a real cause of action for a joint tort against two persons can not be deprived of the right to bring his action against both as defendants, merely because he joined them for the purpose of avoid-

ing the jurisdiction of the federal court. If the right exists, the motive for its exercise can not defeat it."

The other cases cited under subdivision III, page 17 of this brief, amply support the doctrine announced in these cases.

Furthermore, as distinctly recognized in the cases of Landers v. Felton, and Alabama Gt. So. v. Thompson, quoted from *supra*, mere affidavits are not sufficient to establish a charge of fraud. It is true, affidavits are admissible for certain purposes in certain interlocutory proceedings, but no case will be found, with the exception of the decision of the court below in this case, where the issue was as to the existence of fraud, in which a court has convicted a litigant and his counsel of fraud upon any such ex parte showing.

The court, in its supplemental opinion (Trans., p. 27), cites the case of Enstophen (Gustavson) v. Ry. Co., 128 Fed. 85, in support of the proposition that affidavits might be considered for that purpose. But in that case it appears that the court arrived at its conclusion that there had been a fraudulent joinder upon oral testimony, and it does not appear that affidavits were either filed or considered.

Upon the question of the admissibility of an affidavit as evidence, in Wigmore on Evidence, Vol. 3, Sec. 1708, it is said:

> "The requirement of cross-examination, or an opportunity therefor, which is the essential feature of the Hearsay rule, is clearly not satisfied when an affidavit is offered, because, though under oath, it is utter ex parte, without notice to the opponent to afford him the opportunity of cross-examination. Even, if notice were in fact given, in a particular case and the opportunity of attendance thus afforded, the sworn statement thus made would not of itself satisfy the rule; for unless the officer before whom the oath was taken were one empowerd by law to supervise and direct the procedure of taking the testimony, it could not be conceded that there was a real opportunity for a cross-examination in a true and adequate sense. So that, in order truly to furnish such an opportunity, the officer must be thus empowered, and then the sworn statement becomes in effect a deposition, which is conceded at common law to be admissible.
>
> At common law, an affidavit, i. e., a mere sworn statement made out of court, is inadmissible for lack of opportunity of cross-examination."

In support of this proposition the author cites the following cases:

> Pickering v Townsend, 118 Ala. 351; 23 So. 703;
> Smith v. Feltz, 42 Ark. 355, 357;
> People v. Plyer, 126 Cal. 379; 58 Pac. 904.

In Walsh v. Rogers, 13 How. 287, it was said by this court, through Justice Grier, referring to ex parte depositions:

> "Testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have so much or so little of the truth or such a version of it as will suit his case."

We conclude, therefore, that inasmuch as the complaint states a joint cause of action against the non-resident defendant, National Enameling and Stamping Company, and the resident defendant, George Wettengel; and inasmuch as the non-resident defendant, in support of its charge that the allegations of joint liability were fraudulently made, offered nothing except certain affidavits, which appear in the record, which affidavits do not even charge fraud or state facts from which an inference of fraud may be drawn; and inasmuch as those affidavits, upon being analyzed, do not even negative the allegations of joint liability in the complaint; and as there is nothing whatever to show that those allegations were not made in perfect good faith by the complainant and his counsel, the court below clearly erred in overruling the motion to remand.

Respectfully submitted,

EDWARD C. KEHR,
Attorney for Plaintiff in Error,
with him on the Brief,

RICHARD T. BROWNRIGG,
AND WILLIAM L. MASON.